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June 6, 2001

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Via Hand Delivery

Magalie Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: In re Matter of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; File No. NSD-L-99-34

Dear Ms. Salas:

Enclosed please find an original and eleven copies of the Opposition of BellSouth Public Communications, SBC Communications Inc., and the Verizon Telephone Companies to Sprint Corp.'s Request for Stay in the above referenced matter. Please date-stamp and return the extra copy to my messenger.

Thank you for your assistance. If you have any questions, please do not hesitate to call me at (202) 326-7921.

Sincerely,

Aaron M. Panner

Enclosure

No. of Copies rec'd 0+11
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket 96-128
RBOC/GTE/SNET Payphone Coalition Petition for Clarification	)	NSD File No. L-99-34

OPPOSITION OF BELLSOUTH PUBLIC COMMUNICATIONS, SBC COMMUNICATIONS INC., AND THE VERIZON TELEPHONE COMPANIES TO SPRINT CORP.'S REQUEST FOR STAY

INTRODUCTION AND SUMMARY

The Request for Stay filed by Sprint Corporation should be denied because Sprint has demonstrated no likelihood of success on the merits; moreover, the balance of harms weighs heavily in favor of maintaining, rather than staying, the rules adopted in the Commission's Second Order on Reconsideration ("*Second Recon. Order*"),[1] pending any eventual judicial review.

Although Sprint quibbles with the substance of the *Second Recon. Order*, its primary objection is purely procedural: it claims that the Commission could not revise its rules governing the entity responsible for payment of per-call compensation without publishing a notice or proposed rulemaking in the *Federal Register*. That argument fails for two fundamental reasons. First, contrary to Sprint's claims, there are two petitions for reconsideration of the FCC's first

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[1] Second Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 01-109 (rel. Apr. 5, 2001).

Order on Reconsideration ("*First Recon. Order*")[2] pending in this docket. Accordingly, the FCC had the authority to modify any of the rules adopted in that *First Recon. Order* on its own motion without publishing an additional *Federal Register* notice. *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978).

Second, even if the Commission had been subject to a *Federal Register* notice requirement, Sprint cannot complain of any technical deficiency in the Commission's notice procedure because Sprint had actual notice that the Commission was considering the modifications to its rules that it issued in the *Second Recon. Order*. The FCC's Public Notice sought comment on "which interexchange carrier ("IXC") is the party responsible for payment of per-call compensation." Public Notice, *Common Carrier Bureau Seeks Comment on the RBOC/GTE/SNET Payphone Coalition Petition for Clarification Regarding Carrier Responsibility for Payphone Compensation Payment*, 14 FCC Rcd 6476, 6476 (1999) ("*Public Notice*"). Sprint actually filed extensive comments and reply comments in response to that notice. It cannot therefore complain that the FCC's notice procedures were inadequate.

To the extent Sprint purports to challenge the Common Carrier Bureau's order requiring Sprint to pay compensation for calls that Sprint transfers to facilities-based resellers unless the reseller has identified itself to Sprint as being responsible for paying compensation, that challenge comes three years too late and is therefore procedurally barred.

Once Sprint's procedural challenges are brushed aside, it presents no substantive reason to question the Commission's determination that facilities-based carriers should be responsible for

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[2] Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233 (1996).

tracking and paying compensation on calls that they transfer to their reseller customers. The Commission was responding to a well-documented problem that was, in part, of facilities-based carriers' own making. Any expenses that Sprint will incur are well justified, and Sprint has leave to recover those expenses from its reseller customers.

For related reasons, the balance of harms here weighs heavily against a stay. A stay of the Commission's order would preserve a situation in which payphone service providers ("PSPs") are deprived of a very substantial portion of the revenues that they are due. By contrast, Sprint is fully authorized to recover any expenses associated with implementation of additional tracking mechanisms. Other IXCs, including AT&T, WorldCom, and Global Crossing, have indicated no basic disagreement with the Commission's approach, but have merely sought incremental adjustments through the reconsideration process. Their approach belies Sprint's claims of imminent harm. Finally, a stay would be directly contrary to the public interest — as recognized by Congress — because any delay in resolution of the reseller problem will further jeopardize payphone deployment.

ARGUMENT

Sprint cannot satisfy the requirements for a stay. Under the D.C. Circuit's familiar four-prong test, Sprint must carry the heavy burden of demonstrating (1) that they are likely to succeed on the merits; (2) that they will suffer irreparable injury in the absence of a stay; (3) that others will not be harmed if a stay is granted; and (4) that the public interest favors granting a stay. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985). Sprint's request fails at every step.

I. SPRINT WILL NOT PREVAIL ON THE MERITS

A. The Commission Had Authority To Reconsider Its Rules *Sua Sponte*

Section 1.108 of the Commission's rules, entitled "Reconsideration on Commission's own motion," provides that the Commission "may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action." 47 C.F.R. § 1.108. The Order at issue here reconsidered the Commission's decision, in the *First Recon. Order*, to impose per-call compensation obligations on resellers that maintain their own switching capability. *See Second Recon. Order* ¶ 11. Although the *Second Recon. Order* was issued more than 30 days after the *First Recon. Order*, this Commission and the federal courts have held that the 30-day period is tolled where timely petitions for reconsideration remain pending. That is so, moreover, regardless of whether those petitions relate to the specific portion of the order at issue. *See Central Fla. Enters.*, 598 F.2d at 48 n.51 ("a petition for reconsideration of any of [a series of related orders] tolls the thirty day period [under 47 C.F.R. § 1.108] as to all the orders in the case"); *see also* Report and Order and First Order on Reconsideration, *1998 Biennial Regulatory Review — Part 61 of the Commission's Rules and Related Tariffing Requirements*, 14 FCC Rcd 12293, 12323, ¶ 86 n.181 (1999); Second Order on Reconsideration and Memorandum Opinion and Order, *Access Charge Reform*, 12 FCC Rcd 16606, 16626, ¶ 61 n.127 (1997).

The tolling rule applies here because two parties had filed petitions for reconsideration within the initial 30-day period, and those petitions were still before the FCC at the time it issued its *Second Recon. Order*. *See* Petition for Reconsideration of the California Payphone Association, *Implementation of the Pay Telephone Reclassification and Compensation*

Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 (filed Jan. 13, 1997)[3]; Petition for Further Reconsideration of Invision Telecom, Inc., *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (filed Jan. 13, 1997). Sprint's contrary statement in its Request for Stay (*see* Request for Stay at 27) is simply mistaken. In those circumstances, the Commission was free to amend or modify its rules governing the entity responsible for paying per-call compensation, and to do so without providing any additional formal notice. This point alone is fatal to Sprint's procedural arguments.

B. Because Sprint Had Actual Notice of the Contemplated Modifications, Sprint Cannot Complain of Any Technical Defects in Notice Procedure

Sprint's claims are also plainly meritless because the Commission did not rest solely on the preexisting record. Sprint had ample actual notice that the Commission was considering modification of its rules governing the entities responsible for paying per-call compensation, and they participated extensively in the agency proceedings leading up to the *Second Recon. Order*. Having suffered no conceivable prejudice, Sprint should not now be heard to complain of the Commission's alleged failure to engage in formal notice-and-comment rulemaking.

The Administrative Procedure Act's notice-and-comment requirements are not a hollow formalism. They are intended to ensure that parties with an interest in agency proceedings have notice of those proceedings and an opportunity to participate in them. Accordingly, even where an agency has failed to provide full public notice and an opportunity for comment under 5 U.S.C. § 553, that failure is excused when the complaining parties had *actual* notice and were able to

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[3] Although the California Payphone Association filed a motion to withdraw its petition, that motion was never granted; accordingly, the petition for reconsideration remains pending.

make their views known to the agency. *See* 5 U.S.C. § 706(2)(F) ("due account shall be taken of the rule of prejudicial error"); *id.* § 553(b) ("General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or *otherwise have actual notice* thereof in accordance with law.") (emphasis added); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 121 (D.C. Cir. 1987) ("[W]e are satisfied that any error was harmless, . . . for the parties had abundant opportunity to comment on the proposed rule.") (citation omitted); *Common Carrier Conference — Irregular Route v. United States*, 534 F.2d 981, 983 (D.C. Cir.) ("Even where there is a technical flaw in the notice, it can be overcome if the actual conduct of the proceeding provides notice to the participants of what is under contemplation."), *cert. denied*, 429 U.S. 921 (1976); *S. J. Stile Assocs. Ltd. v. Snyder*, 646 F.2d 522, 526 n.8 (C.C.P.A. 1981) ("Whether issuance of Pipeline 524 is a result of rulemaking . . . is mooted by appellants' actual notice and opportunity to participate in the meetings . . . .") (citation omitted).

Here, Sprint had actual notice that the FCC was considering modification of its rules governing, and it actually commented on the issues raised. The RBOC Payphone Coalition has raised concerns about problems with a short-fall in compensation due to non-payment by resellers in a letter to the Commission filed November 17, 1998; in that letter, the Coalition urged the Commission to modify its rules to impose obligations, not on facilities-based resellers, but on the carrier identified by the CIC associated with the called number. Sprint filed an extensive response on December 4, 1998, in which it addressed, among other issues, its arguments concerning why "[p]lacing the obligation [to track and pay compensation] on the carrier owning the 'first interexchange switch' would create further complexities for IXCs in administering per-call

compensation." Letter from Richard Juhnke, General Attorney, Sprint Corp., to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC, CC Docket 96-128, at 5 (Dec. 4, 1998) ("Sprint Dec. 4, 1998, Letter"). The Coalition raised these concerns again in a Petition for Clarification of the Commission's rules governing carrier responsibility for per-call compensation payment. In response, the Commission issued a public notice, seeking comment on "which interexchange carrier ("IXC") is the party responsible for payment of per-call compensation." *Public Notice*, 14 FCC Rcd at 6476. The notice sought comment "on the issues raised in Petitioner's request for clarification." *Id.* Sprint filed comments in response to that notice addressing the merits of the Coalition's proposal and the issues raised.[4] Given this opportunity to participate in the FCC's decisionmaking, Sprint should not be heard to complain of a notice-and-comment deficiency.

C. Sprint's Challenge to the *Coding Digit Waiver Order* Is Three Years Too Late

In April 1998, the Common Carrier Bureau, interpreting the Commission's existing rules, made clear that a facilities-based IXC was excused of the obligation to pay per-call compensation only where "switch-based resale customers have identified themselves as responsible for paying the compensation." Memorandum Opinion and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 13 FCC Rcd 10893, 10915, ¶ 38 (1998). Sprint now claims that this interpretation was in error. Its challenge comes more than three years too late. Under section 1.115(d) of the Commission's rules, an application for review of action taken pursuant to delegated authority "shall be filed

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[4] Sprint's claim that the Commission's determination was not a "logical outgrowth" of the issues raised in the notice (Request for Stay at 26) is frivolous. The very purpose of the proceeding was to clarify the carriers' obligation in cases of calls carried by resellers; the issue of whether the facilities-based carrier should be required to track and pay for calls was discussed throughout the proceeding, including in Sprint's own filings. *See* Sprint Dec. 4, 1998, Letter.

within 30 days of public notice of such action." 47 C.F.R. § 1.115(d). Sprint's failure to challenge the Common Carrier Bureau's interpretation in a timely fashion means that its current claim is procedurally barred.

D. Sprint Has Raised No Serious Substantive Objection to the *Second Recon. Order*

Sprint's pleading identifies no serious substantive basis for questioning the merits of the FCC's determination that facilities-based carriers should be responsible for tracking and paying per-call compensation on calls that they transfer to their facilities-based reseller customers. Although Sprint objects to the burdens that the payment of per-call compensation imposes on it — objections that are familiar from Sprint's prior filings in this docket — the objections simply confirm the soundness of the Commission's approach in the *Second Recon. Order*.

1. Sprint objects that it will be forced to "assume[] the risk of non-payment" by its facilities-based reseller customers. Request for Stay at 15. But the Commission found that *PSPs* had incurred massive losses precisely because "facilities-based carriers" — like Sprint — "and switch-based resellers determine independently that they are not responsible for compensating PSPs under our rules." *Second Recon. Order* ¶ 14. The FCC specifically found that "underlying facilities-based carriers, who have a customer relationship with resellers, are in a far better position to track the calls and provide adequate information to PSPs." *Id.* ¶ 16. The Commission also found that "facilities-based carriers may recover from their reseller customers the expense of payphone per-call compensation and the cost of tracking compensable calls." *Id.* ¶ 18. Precisely because Sprint has a contractual relationship with its reseller customers, it is far better situated to enforce its rights to compensation than a PSP, who has no contractual relationship, no knowledge

of the identity of the responsible carrier, and no leverage in attempting to collect unpaid amounts. Sprint's reported bad-debt problems with its reseller customers pales in comparison to those experienced by PSPs. Sprint is at liberty to raise its rates to cover any such shortfalls and — even if Sprint's bad debt problem is real — will suffer no competitive harm as a result since all facilities-based carriers will operate under the same rules.

2. Sprint complains that the Commission's rules will require it to modify its call tracking systems and that Sprint may have difficulty obtaining adequate data from its reseller customers. Sprint's reported problems again pale compared to those of PSPs, who have had no access to any data from resellers and who have spent tremendous amounts of money in an often vain attempt to reduce compensation shortfalls. Indeed, Sprint's own experience emphasizes the minor burden that the Commission's rules impose. To establish its tracking systems, Sprint spent a mere $1 million, with continuing expenses of $165,000 each quarter. That amount is practically de minimis in comparison to Sprint's annual payment obligation of approximately $100 million, and Sprint is fully able to recover all such expenses from its customers. By contrast, the Commission has authorized PSPs not a single cent to compensate them for the expense of collecting per-call compensation or for the massive bad-debt losses that PSPs have experienced.

3. Sprint raises additional complaints that the data tracking and reporting requirements imposed by the *Second Recon. Order* are too burdensome and require difficult coordination with reseller customers. Sprint gives no evidence to suggest that any of these issues present insurmountable — or even particularly significant — difficulties. If there are particular aspects of the Commission's new requirements that are especially costly to implement, Sprint is free to work with PSPs to arrive at private arrangements that adequately protect all parties'

interests. *See id.* ¶ 19. What IXCs may no longer do is attempt to hide behind supposed ambiguities in the Commission's rules and the information imbalance with PSPs to evade per-call compensation obligations.

II. THE BALANCE OF HARMS MITIGATES STRONGLY AGAINST A STAY

Sprint's challenge to the *Second Recon. Order* is plainly without merit, and this provides reason enough to deny its request for stay. But Sprint is also unable to satisfy the additional requirements for extraordinary relief: it cannot establish that the balance of harms favors preservation of the status quo.

First, and most important, the *Second Recon. Order* addresses a massive problem that is causing grave injury to PSPs. As the Commission found, under the prior rules, "PSPs suffer shortfalls in compensation when calls are routed from an IXC to a switch-based reseller." *Id.* ¶ 8. Yet the current per-call compensation rates make no allowance at all for the cost of that bad debt. Because the current per-call compensation rate permits bare cost recovery for marginal payphones *not including* the cost of bad debt, the prior rules effectively guaranteed that PSPs have not been fairly compensated for calls from their payphones. The magnitude of that loss is in the hundreds of millions of dollars each year. That loss is truly irreparable, because PSPs have no power to raise their rates for dial-around compensation, a rate locked in place until January 2002.

The need to staunch the bleeding was apparent. PSPs face a number of competitive challenges due to increased use of wireless phones and declining payphone use generally, as well as heavy promotion of dial-around alternatives and calling cards by facilities-based carriers and resellers alike. A stay of the *Second Recon. Order* would simply reopen the wound and guarantee continuing unrecoverable losses for PSPs.

By contrast, Sprint has done nothing to document the likely cost of compliance with the Commission's recent order; its vague claims that it would cost "millions" is belied by the fact that implementation of the prior tracking mechanism cost $1 million, a tiny sum in comparison to the magnitude of compensation obligations at stake here. Sprint is fully able to recover any such costs from its customers, without suffering any competitive harm (since all IXCs are subject to the same requirements).

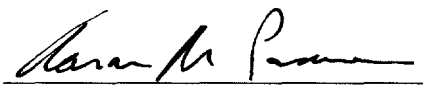
Indeed, the approach of every other major IXC emphasizes the lack of credibility behind Sprint's claims of imminent harm. Although AT&T, WorldCom, and Global Crossing have sought modification of certain aspects of the *Second Recon. Order*, none has sought a stay, and none has challenged the Commission's basic approach.

Finally, a stay would directly threaten "the widespread deployment of payphone services." 47 U.S.C. § 276(b)(1). Because Congress explicitly declared its intention to promote such widespread deployment, a stay would constitute a direct threat to the public interest. The Commission should therefore deny Sprint's request for stay; any other course threatens irreparable harm to PSPs, and significant harm to the public interest.

CONCLUSION

The Commission should deny the Request for Stay.

Respectfully submitted,



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Counsel for BellSouth Public Communications, SBC Communications Inc., and the Verizon telephone companies

June 6, 2001

CERTIFICATE OF SERVICE

I, Tara M. Brooks, hereby certify that on this 6th day of June 2001, one copy of the **Opposition of BellSouth Public Communications, SBC Communications Inc., and the Verizon Telephone Companies to Sprint Corp's Request for Stay** was served upon the parties listed below by hand delivery.

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